86 - 1304

No.

In the
Supreme Court of the United States

OCTOBER TERM, 1986

MARSHALL CAIFANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RICHARD B. CAIFANO
Attorney for Petitioner
188 W. Randolph St.
Chicago, IL 60601
(312) 346-0570

The Scheffer Press, Inc.—(312) 263-6850

QUESTIONS

1. Whether petitioner was denied Due Process by the Court of Appeals' failure to have observed the mandate of Title 18 U.S. Code Section 3576 requiring review of the sentence imposed with written findings supporting its determination.

2. Whether trial counsel's failure to seek exclusion of evidence on grounds of collateral estoppel and prejudicial impact so deprived petitioner of ineffective assistance of counsel as to require retrial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No.

MARSHALL CAIFANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINION BELOW

There are no published opinions in this case. The Memorandum Order of the district court is provided in Exhibit A of the Appendix. The *per curiam* summary affirmance by the Eleventh Circuit Court of Appeals is provided in Exhibit B of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1986. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. 1254(1).

STATUTES INVOLVED

This case involves Title 18, United States Code, Section 3575—*Dangerous Special Offender,* and Section 3576—*Review of a Dangerous Special Offender Sentence.* The pertinent portions of those statutes are provided in Exhibit C of the Appendix.

RELEVANT CONSTITUTIONAL PROVISIONS

This case involves the Fifth Amendment's Due Process Clause and the Sixth Amendment's guarantee to effective assistance of counsel.

STATEMENT OF THE CASE

In 1979 an indictment was filed in the Southern District of Florida charging petitioner with three offenses. Count One charged that petitioner and others conspired to possess stolen stock certificates and to transport same in interstate commerce. Count Two charged petitioner and another with transporting the same securities from Illinois to Florida; and, Count Five charged petitioner and others with transporting stolen securities from Florida to Texas.

Petitioner alone was tried by a jury sitting at Miami, in the Southern District of Florida. While the jury acquitted petitioner of the offense charged by Count Five, a verdict was not reached on the remaining counts and the trial judge declared a mistrial. Less than a month later, a retrial was held before another jury at West Palm Beach in the Southern District of Florida, which returned a guilty verdict on the remaining counts. Following conviction, the government proceeded against petitioner as a dangerous special offender pursuant to 18 U.S.C. 3575. A sentencing hearing was conducted resulting in the trial court's finding that petitioner was a dangerous special offender. On that finding, petitioner was sentenced to twenty years on each count, the sentences to run concurrently.

Petitioner appealed from his conviction and sentence. On January 26, 1982, the Eleventh Circuit Court of Appeals affirmed the conviction in an unpublished opinion.

Thereafter, petitioner filed a Petition for Habeas Corpus Relief pursuant to Title 18 U.S. Code Section 2255 charging, *inter alia,* (a) that the Eleventh Circuit's failure to review the propriety of the dangerous special offender sentence, as mandated by 18 U.S.C. 3576, denied petitioner due process. Relief was further sought on the basis that petitioner was denied effective assistance of counsel by his trial attorney's (i) failure to have sought exclusion of evidence relating to the offense for which petitioner had been acquitted at the earlier trial, and (ii) failure to have sought exclusion or limitation of evidence detailing petitioner's past record of convictions and incarceration.

Without requiring the government to respond, the District Court summarily denied the 2255 petition, finding that petitioner was entitled to no relief. As to the first issue noted above, the Court observed that the "defendant's prayer for remedy, if any, must have been or must be made to the appellate court or the Supreme Court" See Exhibit A, Appendix.

Petitioner appealed from the order of the District Court to the Eleventh Circuit Court of Appeals which, in a one word *per curiam* order, "affirmed" the District Court's ruling, See Exhibit B, Appendix. An opinion was not issued by the Court of Appeals and petitioner did not seek rehearing before the Appeals Court.

Petitioner prays this Court's review of his conviction and sentence. Petitioner's twenty year sentence as a dangerous special offender violates due process because the Court of Appeals utterly failed to review that sentence on direct appeal as mandated by 18 U.S. C. 3576. That failure deprived petitioner of appellate determination of the following: (a) whether the clear and convinc-

ing standard rather than the preponderance of the evidence standard should be used to prove future dangerousness; and, (b) whether the trial court's sentence of twenty years on both counts without first imposing sentence on the underlying felonies as well as its failure to determine proportionality, constituted error.

Petitioner's conviction offends the Fifth and Sixth Amendments of the Constitution because evidence relating to the offense of which petitioner had been acquitted was improperly admitted at retrial, unchallenged by defense counsel. That conviction was further tained by evidence of petitioner's record of prior convictions and incarceration concerning which trial counsel took no action to exclude or lamit, all to the prejudice of petitioner.

REASONS FOR GRANTING THE WRIT

This case presents significant issues of statutory construction and the duty of defense counsel seek exclusion of *per se* inadmissible evidence. On both issues, there remain conflicts among the Circuit Courts of Appeal.

1. Improper Imposition of Enhanced Sentence

The dangerous special offender statute, 18 U.S.C. 3575, permitted the trial judge to enhance the sentence of a defendant found to be "special offender," [Title 18 U.S.C. Section 3575(e)], who is proven, by a preponderance of the information, to be "dangerous" [Section 3575(f)]. The statute defines "dangerous" as the engagement by the accused in future criminal activity. Section 3575(b) places limitations upon a dangerous special offense sentence; it may not exceed 25 years and it may not be "disproportionate in severity to the maximum term otherwise authorized by law for such felony". An enhanced sentence may only be imposed on a finding that a "period of confinement longer than that provided for such felony is required to protect the public from further criminal activity by the defendant" Section 3575(f).

Because of the potential for unwarranted use and the implicit severity resulting from enhancement, Congress required that such a sentence be subject to appellate review. Title 18 U.S.C. 3576 provides in pertinent part:

> . . . Review of the sentence *shall* include review of whether the procedure employed was lawful, the findings were clearly erroneous, or the sentencing court's discretion was abused. . . . The court of appeals *shall state in writing* the reason for its disposition of the review of the sentence (emphasis added).

Opinions of at least four Circuit Courts of Appeal have held that the "standard of appellate review under [Sec-

tion 3576] is much greater than that normally provided on appeal from sentencing decisions." *United States* v. *Scarborough*, 777 F.2d 175, 179-80 (4th Cir. 1985); *United States* v. *Thornley*, 733 F.2d 970, 971 (1st Cir. 1984); *United States* v. *Felder*, 706 F.2d 135, 137-38 (6th Cir. 1984); *United States* v. *Stewart*, 531 F.2d 326, 332 (6th Cir. 1976); *United States* v. *Soto*, 779 F.2d 558, 562 (9th Cir. 1986).

In contrast, the Eleventh Circuit, although being presented on direct appeal with numerous challenges to petitioner's enhanced sentence, not only failed to review the sentence but also failed to state its written reasons for review. When petitioner, by *Habeas Corpus*, challenged that failure as a denial of due process, the district court stated that his "remedy, if any, must have been or must be made to the appellate court or the Supreme Court". Accordingly, in his appeal from the district court's denial of Habeas Corpus relief, petitioner addressed that omission to the forum which failed to follow the mandate of Section 3576. The request was not considered by the Eleventh Circuit, forcing petitioner to seek enforcement of the legislative mandate in this, his court of last resort.

Proof of future dangerousness by the preponderance of the evidence standard creates a substantial risk of an erroneous deprivation of liberty. In *Addington* v. *Texas*, 441 U.S. 418 (1979), this Court noted that it is almost impossible to predict future dangerousness, See also, *United States* v. *Salerno*, 794 F.2d 64, 72 (2d Cir. 1986), *cert. granted*, 40 CrL 4073 (11/5/86). Because future dangerousness cannot be demonstrated by any standard of proof, preventive detention solely on the basis of anticipated future dangerousness is unconstitutional.

Sprect v. *Patterson*, 386 U.S. 605 (1967), teaches that where an individual is subjected to an enhanced sentence,

the sentencing hearing must be accompanied by "all those safeguards which are fundamental and essential to a fair trial", 386 U.S. at 609-10. While *Sprect* does not dictate the standard of proof to be used in such proceedings, this Court's opinion in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) requires an evaluation of the following factors in determining what standard is appropriate to a particular proceeding: the private interest, the risk of an erroneous deprivation, the value of additional safeguards and the government's interest.

Certainly, petitioner has a fundamentally important private interest in not being confined beyond the maximum provided by the statutes under which he was convicted. However, the use of the lowest of the three standards of proof to prove future dangerousness (when coupled with the impossibility of *proving* future dangerousness) creates a substantial risk that petitioner, although not dangerous,[1] will be unduly deprived of his liberty. A higher standard of proof would reduce that risk and would mitigate the uncertainty inherent in determinations centered about anticipated conduct. Such a standard would also serve to preserve the government's interests to protect society from dangerous individuals and to insulate individuals not found to be dangerous from enhanced incarceration.

This Court has ruled that requiring future dangerousness to be demonstrated by proof beyond a reasonable doubt presents an insurmountable hurdle (*Addington*, 441

[1] At the time of his sentencing hearing petitioner was 69 years of ago, and in failing health. There was no evidence presented at the hearing that petitioner, for a period of five years prior to the hearing, had been involved in any criminal activity or had associated with known criminals.

U.S. at 429-30); however, the clear and convincing evidence standard would serve to promote the interests of the individual and the government.[2] The latter standard is used to determine dangerousness in other contexts, to wit: mental patients, *Addington*; sex offenders, *Hollis* v. *Smith*, 571 F.2d 685 (2d Cir. 1978); bail pending appeal, 18 U.S.C. 3143(b). *A fortiori*, in petitioner's case where a finding of dangerousness is final, the implementation of the higher standard is required.[3]

By definition, the enhanced sentencing procedure requires a judge to first sentence a defendant on the underlying felony, and only then to enhance that sentence based on specific criteria. It is that very process which differentiates enhancement from the usual sentencing proceeding. In the case of a sentence to be imposed under Section 3575(b), the argument for such a procedure is made even stronger by the statutory requirements that the enhancement not be "disproportionate in severity" to a sen-

---

[2] Although virtually every circuit in the country has held that the reasonable doubt standard is not appropriate for dso hearings, *see e.g.*, *United States* v. *Inendino*, 604 F.2d 458 (7th Cir. 1979), only one circuit has rejected the clear and convincing standard. *See United States* v. *Schell*, 692 F.2d 672 (10th Cir. 1982), where Judge McKay, in a strongly worded dissent, recognized that the clear and convincing standard would protect the interests of both the individual and the government, 692 F2d at 679-84.

[3] In *McMillan* v. *Pennsylvania*, 91 LEd 2d 67 (1986), a majority of this Court upheld a statute which provided for an enhanced sentence upon proof by a preponderance of the evidence that the defendant committed the felony with a firearm. The instant case presents the factual determination of an elusive and subjective concept—future dangerousness—as opposed to the objective finding as to whether or not a weapon was used in the commission of a felony.

tence authorized by the underlying felony and by the additional safeguard requiring appellate review the proportionality of the sentence imposed. A proportionality review is virtually impossible without a sentence on the underlying felony. See, *United States* v. *Calabrese*, 755 F.2d 302, 305 (2d Cir. 1985); *United States* v. *Scarborough*, 777 F.2d 175, 176 (4th Cir. 1985); *United States* v. *Soto*, 779 F.2d 558, 559 (9th Cir. 1986), where sentences enhanced in the proper manner were upheld.

In petitioner's case, the sentencing judge failed to impose a sentence on the underlying felony. Instead, he simply sentenced petitioner to concurrent terms of twenty years on each of two counts. Since the maximum sentence on Count One was five years while the maximum sentence on Count Two was ten years, it is clear that the court did not conduct a proportionality determination. Not only is the sentence contrary to express mandate of the statute, it is also ambiguous and illegal[4].

The court of appeals is required, by the mandatory language of title 18 U.S.C. 3576, to review the dangerous special offender sentence. Petitioner's challenges to his sentence are not frivolous. The Eleventh Circuit Court of Appeals should have reviewed them on direct appeal, stating the results of its findings in writing. Its failure to have done so on appeal and its continued avoidance of the issue as raised by Habeas Corpus has denied petitioner due process of law.

---

[4] Although the Eleventh Circuit did not review petitioner's sentence, had it done so and determined that it had been improperly imposed, there would not have been any sentence remaining for petitioner to serve. This is yet another reason why a sentencing court must first sentence on the underlying felony before enhancing it.

2. Denial of Effective Assistance of Counsel

In seeking *Habeas Corpus* relief, petitioner has advanced the following substantial omissions on the part of his trial counsel as evidence of his constitutionally defective performance:

a) trial counsel took no action to exclude or limit government evidence at retrial which related to the charge of which petitioner had been acquitted; this, despite the fact that such evidence was obviously inadmissible under the Doctrine of Collateral Estoppel;

b) trial counsel failed to exclude evidence of petitioner's prior incarceration and, when such evidence was admitted during the government's case-in-chief, counsel failed to seek mistrial, despite the obvious prejudicial impact of such evidence upon the trier of fact; and,

c) trial counsel failed to seek exclusion or limitation of evidence detailing petitioner's prior convictions on the basis of their staleness and prejudicial impact, despite the fact that counsel had notice of the intended use of such evidence by the government.

The foregoing omissions were not addressed by the Court of Appeals in its order of affirmance and were characterized by the District Court as "tactical decisions of counsel".

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court held that in order to demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the inadequate performance prejudiced the defense, 104 S. Ct. at 2066. In the instant case, by not seeking to exclude evidence relating criminal conduct of which petitioner had been

acquitted and evidence of petitioner's prior convictions and incarceration, trial counsel's performance was woefully deficient.

It is fundamental that the government is prohibited under the doctrine of collateral estoppel from relitigating evidence resolved against it at a prior trial. *Ashe* v. *Swenson,* 397 U.S. 436 (1970). Collateral estoppel protects a defendant from redetermination of evidentiary facts as well as ultimate facts, *Wingate* v. *Wainwright,* 464 F.2d 209, 213 (5th Cir. 1972). The doctrine has been applied in cases where the jury has acquitted a defendant of a substantive offense but has failed to reach a verdict on a conspiracy offense. In all such instances, the government is precluded at retrial from reintroducing evidence of an offense which has resulted in an acquittal; See e.g., *Yawn* v. *United States,* 244 F.2d 235 (5th Cir. 1977); *United States* v. *Mespoulede,* 597 F.2d 329 (2d Cir. 1979); *United States* v. *Gornto,* 792 F.2d 1028 (11th Cir. 1986). Introduction of such evidence is inherently prejudicial and inadmissible for any purpose. Its admission without challenge by trial counsel cannot be dismissed as an acceptable "tactical decision".

Evidence of defendant's prior incarceration during the prosecution's case-in-chief has been held to be so prejudicial as to constitute *per se* reversible error. *Tallo* v. *United States,* 344 F.2d 467 (1st Cir. 1967); *United States* v. *Smith,* 403 F.2d 74 (6th Cir. 1968); *United States* v. *Gray,* 468 F.2d 257 (3d Cir. 1972); *United States* v. *Sostarich,* 684 F.2d 606 (8th Cir. 1982).

In *Michelson* v. *United States,* 335 U.S. 469 (1948), this Court held that testimony regarding a defendant's prior record is not admissible against him in the prosecution's case-in-chief, 335 U.S. at 476. Accord, *Marshall* v.

United States, 360 U.S. 310 (1959). This prohibition precludes inquiry concerning a defendant's prior convictions and the details thereof (Rule 609, Federal Rules of Evidence), *United States* v. *Tumblin*, 551 F.2d 1001, 1004 (5th Cir. 1977).

In petitioner's case, defense counsel not only failed to seek exclusion of the evidence relating to and detailing the offense of which he had earlier been acquitted; but, when the government's principal witness testified to petitioner's incarceration in the Atlanta Federal Penitentiary, counsel not only failed to move for a mistrial, he underscored the prejudicial impact of that testimony by cross examining that witness concerning that incarceration. Additionally, when petitioner was called to testify in his defense, his counsel questioned petitioner repeatedly concerning the details of his earlier convictions. Clearly, these errors and omissions do not fall within "the wide range of reasonable professional assistance," *Strickland*, 104 S.Ct. at 2066.

Petitioner was obviously prejudiced by his counsel's deficient performance. Primarily, the jury was allowed to consider detailed evidence of the transportation of securities from Florida to Texas and evidence of petitioner's prior incarceration and convictions simply because that evidence was not challenged by defense counsel. The objectionable evidence served only to taint the jury's consideration of the evidence relevant to the charges then being tried and to undermine petitioner's presumption of innocence. And, because counsel failed to object to the introduction of such improper evidence, the issues were not preserved for review. A seasoned practitioner may never simply allow the admission of clearly objectionable and highly prejudicial evidence as trial strategy. Neither

may his failure to challenge same be excused as acceptable "tactical decisions."

Circuit Courts of Appeal have held such errors and omissions as those advanced by this petition to constitute ineffective assistance of counsel, *Lyons* v. *McCotter,* 770 F.2d 529 (5th Cir. 1985); *Pickens* v. *Lockhart,* 714 F.2d 1455 (8th Cir. 1983), *Gray* v. *Greer,* 800 F.2d 644 (7th Cir. 1986), *after remand,* 39 CrL 4100 (7/2/86). Yet, petitioner's pleas for relief have thus far been ignored or simply dismissed as insignificant. Only this Court can rectify the constitutional deficiencies attendant to petitioner's conviction to the end that the Sixth Amendment's guarantee to effective assistance of counsel be meaningful to petitioner whose trust in the adequacy of trial counsel was obviously misplaced.

CONCLUSION

This Court's intervention is sought in order to clarify the important issues raised, to resolve the existing conflicts among the Circuits on matters addressed by this Petition and to provide necessary guidance to lower courts concerning standards to be utilized in sentence enhancement proceedings. Thousands of people are sentenced each year under a variety of statutory provisions permitting enhancement. A definitive ruling by this Court would ensure consistency in the procedure to be followed and the standard to be applied in this important area.

This case presents serious deprivations of the constitutional guarantee to effective assistance of counsel, a guarantee which was not afforded petitioner. Only this Court may correct that miscarriage. For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

RICHARD B. CAIFANO
Attorney for Petitioner
188 W. Randolph St.
Chicago, IL 60601
(312) 346-0570

APPENDIX

EXHIBIT A—District Court's Memorandum Order

EXHIBIT B—Eleventh Circuit's Summary Affirmance

EXHIBIT C—Statutes Involved

Title 18 U.S. Code § 3575

Title 18 U.S. Code § 3576

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-129-Cr-Paine
(86-393-Civ-Paine)

UNITED STATES OF AMERICA)
v.)
MARSHALL CAIFANO,)
Defendant.)

ORDER DENYING PETITION TO VACATE AND SET ASIDE SENTENCE PURSUANT TO 28 U.S.C. §2255

Before the Court is the petition of the defendant, Marshall Caifano, for relief pursuant to 28 U.S.C. §2255. In accordance with Rule 4 of the rules governing §2255 petitions or motions, the defendant's submission has been examined by the undersigned trial judge together with all files, records, transcripts and correspondence relating to the judgment under attack. I find that it plainly appears from the face of the motion, the memorandum in support thereof and the record of prior proceedings that the movant is not entitled to relief. Each of the grounds advanced by the defendant have been examined and the relevant facts and law reviewed in connection therewith.

Ground One of the defendant's motion asserts denial of effective assistance of counsel. Four separate allegations of ineffective assistance are stated. The first of these asserts that trial counsel failed to move under Federal Rule of Criminal Procedure 12(b)(2) to dismiss for duplicity Count I of the indictment which charged, it

is asserted, two conspiracies in a single count. A review of the record does not lead to the conclusion that two conspiracies existed. There can be no conclusion of duplicity because of the admission of evidence showing that separate acts were carried out in order to consumate the conspiracy. A conspiracy to do two unlawful acts is still a single conspiracy. The second assertion of ineffective assistance of counsel is that counsel failed to move to prohibit in the second trial evidence presented at the first trial to prove Count V of the indictment for which the defendant was acquitted in the first trial. Evidence of the acts charged in Count V of the indictment admitted in support of the conspiracy charged in Count I do not constitute a violation of the doctrine of collateral estoppel and/or ineffective assistance of counsel for much the same reasons as heretofore stated. The third assertion of ineffective assistance of counsel is that the trial counsel failed to move to exclude, under Federal Rule of Evidence 609(a)(1) and 609(b) evidence of the defendant's prior convictions and evidence of his incarceration in the Atlanta Penitentiary. These rules have been examined in the light of the evidence which was offered and we find no violation of them nor any quarrel with the tactical decision of counsel to put the defendant on the witness stand. The fourth assertion of ineffective assistance of counsel is that defense counsel failed to request an instruction of "causing" the transportation of securities. However, the jury was adequately instructed with respect to the elements of each of the offenses of which he was convicted. We find no merit in this assertion.

The second ground of the §2255 motion asserts that the sentence imposed on the defendant violated his constitutional rights to due process. The requirements of

18 U.S.C. §3575 *et seq.* were met by the evidence in this case and in the post trial hearing which was held as to the applicability of the dangerous special offender statute. Therefore, the first two subsections of ground two which are advanced by the defendant are found to be without merit. The third assertion of violation of constitutional right to due process is that the Court's sentence is illegal, ambigious and not in conformity with §3575 because it exceeds the statutory maximum and amounts to double enhancement. Again, the provisions of the section in question were carefully followed and no ambiguity in this sentence, as stated, is apparent. The fourth assertion of failure of constitutional due process is that the appellate court review of the dangerous special offender sentence fails to state its reasons in writing for the disposition on review. 18 U.S.C. 3576. The record before this Court reveals no failure of constitutional due process resulting from the appellate court review of the enhanced sentence. The defendant's prayer for a remedy, if any, must have been or must be addressed to the appellate court or to the Supreme Court.

Finding no merit in the petition pursuant to 28 U.S.C. §2255, it is

ORDERED and ADJUDGED that the motion be and the same is hereby denied.

DONE and ORDERED at West Palm Beach, Florida this 28th day of April, 1986.

/s/ James L. Paine
United States District Judge

cc: U.S. Attorney
Richard B. Caifano, Esq.

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-5345

D.C. Docket No. 86-393

MARSHALL CAIFANO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(November 26, 1986)

Before KRAVITCH and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

Judgment Entered: November 26, 1986
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Chief Deputy Clerk

ISSUED AS MANDATE: DEC 18 1986

EXHIBIT C

STATUTES INVOLVED

Title 18 U.S. Code

§ 3575. Increased sentence for dangerous special offenders

(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender and his counsel.

(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held before sentence is imposed, by the court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropri-

ate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

(c) This section shall not prevent the imposition and execution of a sentence of death or of imprisonment for life or for a term exceeding twenty-five years upon any person convicted of an offense so punishable.

(d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special offender to less than any mandatory minimum penalty prescribed by law for such felony. This section shall not be construed as creating any mandatory minimum penalty.

(e) A defendant is a special offender for purposes of this section if—

(1) the defendant has previously been convicted in courts of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's

release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year under applicable laws of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof; or

(2) the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such conduct. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds

the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938 (52 Stat. 1602, as amended 80 Stat. 838), and as hereafter amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of the Internal Revenue Act of 1954 (68A Stat. 17, as amended 83 Stat. 655), and as hereafter amended. For purposes of paragraph (2) of this subsection, special skill or expertise in criminal conduct includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension for such conduct, or the disposition of the fruits or proceeds of such conduct. For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant.

(g) The time for taking an appeal from a conviction for which sentence is imposed after proceedings under this section shall be measured from imposition of the original sentence.

Title 18 U.S. Code

§ 3576. Review of sentence

With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court

could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.

No. 86-1304

In the Supreme Court of the United States

OCTOBER TERM, 1986

MARSHALL CAIFANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

29 pp

QUESTIONS PRESENTED

1. Whether the court of appeals' failure to state in writing its reasons for affirming petitioner's sentence under the Dangerous Special Offender statute, 18 U.S.C. 3575-3576, where petitioner never requested such a written statement on direct appeal, denied petitioner due process and requires vacation of his sentence on collateral attack.

2. Whether petitioner's trial attorney was constitutionally ineffective for (1) failing to object to evidence on the ground that it related to a count for which petitioner had earlier been acquitted, when the evidence was admissible to prove a pending charge of conspiracy; (2) failing to prevent inadvertent admission of evidence of petitioner's prior incarceration during the testimony of a government witness, when petitioner himself admitted and explained his prior convictions; and (3) failing to seek exclusion of petitioner's prior convictions, when the convictions were admissible under Fed. R. Evid. 609(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1304

MARSHALL CAIFANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order affirmance of the court of appeals (Pet. App. 4a) is reported at 807 F.2d 997 (Table). The opinion of the district court (Pet. App. at 1a-3a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1986. The petition for a writ of certiorari was filed on February 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of interstate transportation of stolen securities and of conspiracy to possess and to transport such securities, in

violation of 18 U.S.C. 2314 and 371.[1] The district court, after a hearing, found petitioner to be a dangerous special offender under 18 U.S.C. 3575 and sentenced him to 20 years' imprisonment. The court of appeals, in an unpublished opinion, affirmed petitioner's convictions and sentence in January 1982. In 1986, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court summarily denied the petition (Pet. App. 1a-3a), and the court of appeals affirmed in a per curiam order (*id.* at 4a).

1. Petitioner was convicted for his involvement in a scheme to dispose of blank stock certificates that were stolen at O'Hare Airport in October 1968. App., *infra*, 1a-2a. The district court then held a hearing on the government's request to have petitioner sentenced under the Dangerous Special Offender (DSO) statute, 18 U.S.C. 3575. The evidence at the hearing showed that petitioner had a long history of violent and illegal activities and a reputation as an "enforcer" in organized crime (17 R. 889).

Jimmy Fratianno, a former mobster who was cooperating with the government in a number of investigations and prosecutions, testified that petitioner was initially introduced to him in 1952 as a member of the Cosa Nostra (17 R. 712, 716). Alva Rodgers, a former associate of petitioner's at the Atlanta Penitentiary and the government's main witness against petitioner at trial, testified that petitioner had spoken of his lifelong membership in the Chicago organized crime family and claimed to have been

---

[1] Petitioner was charged, in a three-count indictment, with conspiracy to possess and to transport stolen stock certificates, with interstate transportation of such certificates between Illinois and Florida, and with interstate transportation of some of the certificates between Florida and Texas. At petitioner's first trial, the jury acquitted him of the third charge but was unable to reach a verdict on the remaining two counts. At his second trial, petitioner was convicted on both those charges.

part of the "Outfit," as the Chicago crime syndicate is called, since he was 19 years of age (17 R. 784, 788). Petitioner had told Rodgers that he was a hit-man for the Chicago organization and boasted that he was good at the job (17 R. 789-790). A Chicago police captain and FBI Special Agent O'Rourke further testified to petitioner's long-time membership in the Chicago organized crime syndicate (17 R. 899, 911). In addition, state and federal law enforcement officers suspected petitioner of involvement in at least two murders and one attempted murder.

The victim of the first suspected murder was Ray Ryan. In 1963, petitioner and two others approached Ryan, a wealthy oil man and known gambler (17 R. 879), and demanded that Ryan pay $60,000 to the Chicago syndicate. Ryan refused and was pursued to Las Vegas, where petitioner and others threatened him and beat him up. Ryan ultimately testified against petitioner (17 R. 881) and was instrumental in securing petitioner's conviction for extortion. Afterwards, petitioner sought revenge and asked Joey Lombardo, a member of the Chicago organization, to arrange for Ryan to be killed. Lombardo proposed instead that Ryan pay $1 million to the Chicago organization to compensate for petitioner's imprisonment, but Ryan refused (17 R. 822-823). On October 18, 1977, Ryan was killed by a dynamite bomb when he started his car (17 R. 880-881; see also 17 R. 730).

Petitioner was also suspected of involvement in the murder of Richard Cain, a courier for Sam Giancana, the former head of the Chicago organized crime family (17 R. 875-876). In 1973, Cain and Giancana severed their association. In December 1973, petitioner told Rodgers that he had tried to kill Cain but that the effort had been aborted. Later that month, petitioner went to a sandwich shop where Cain was eating; after petitioner left, Cain was

shot in the neck by a man wearing a ski mask (17 R. 812-816, 877-878). Petitioner subsequently told his associate, Rodgers, that Joey Lombardo had killed Cain (17 R. 818).

Petitioner was further suspected of involvement in the attempted murder of Louis Barbe, who had been cooperating with the government in a state insurance fraud prosecution of petitioner (17 R. 872-875, 877). After petitioner was charged, but before his trial began, Barbe was seriously injured by a dynamite bomb that exploded when Barbe started his car (17 R. 873-875). Barbe subsequently decided not to testify against petitioner (18 R. 1024; see also 17 R. 718-725).

According to FBI Special Agent O'Rourke, informants reported that after petitioner's release from the Atlanta Penitentiary in 1972, petitioner progressed from extortion of pornography businesses into wholesale pornography distribution (17 R. 806-809, 900-901). In addition, petitioner repeatedly admitted at the district court hearing that he returned to illegal bookmaking and gambling within a month of his release in 1972 and that he began to finance illegal bookmaking operations (18 R. 1013-1017). The Racine Social Club, which was in petitioner's district, paid petitioner a percentage of its profits in order to stay in business (17 R. 795). Finally, petitioner himself corroborated the testimony of Rodgers, Fratianno, and the two law enforcement officers concerning his long-standing association with several organized crime figures (*e.g.*, 17 R. 712, 714-715, 727, 784, 790, 792, 806; 18 R. 1017-1019, 1024, 1031-1032, 1034, 1055).

Based on evidence at the trial, at the hearing, and in the presentence report, the district court found that petitioner was an active member of organized crime and that he supported himself in part through payments from pornography and gambling operations, as well as through

sham salaries paid by two legitimate businesses (18 R. 1097-1098; see also 17 R. 792-794). Accordingly, the court found that petitioner was "dangerous" within the meaning of the DSO statute. After considering petitioner's age and health, the court concluded that continued and lengthy incarceration of petitioner was in the best interest of the public. The court therefore sentenced petitioner to concurrent terms of 20 years' imprisonment on each count.

2. On direct appeal from his conviction, petitioner did not challenge the sufficiency of the evidence or otherwise argue that he was not guilty of the charged offense. Instead, he challenged his conviction based on alleged improprieties in the government's cross-examination of him at trial, its alleged "bolstering" of a government witness by reference to the witness's plea agreement, and a statement by the judge in ruling on a defense objection to certain evidence. Petitioner also challenged his sentence under the DSO statute.

In his attack on the DSO sentence, petitioner argued that, by requiring proof of dangerousness only by a preponderance of the evidence, the DSO statute violated the Fifth Amendment Due Process Clause. He contended that due process requires proof of dangerousness beyond a reasonable doubt or, at the least, by clear and convincing evidence. Petitioner also argued that the statutory definition of "dangerous" was impermissibly vague and that the district court's findings were clearly erroneous.

In response to petitioner's challenge to his sentence, the government pointed out that courts have uniformly rejected the claim that due process requires a finding of dangerousness beyond a reasonable doubt and have approved the statutory standard of preponderance of the evidence. See, *e.g.*, *United States* v. *Fatico*, 603 F.2d 1053, 1057 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). The government also noted the judicial rejection of peti-

tioner's claim that the statutory definition of dangerousness was unconstitutionally vague. See, *e.g.*, *United States* v. *Neary*, 552 F.2d 1184, 1194 (7th Cir.), cert. denied 434 U.S. 864 (1977). Finally, the government noted that a finding of dangerousness under the statute does not require proof of a propensity for violence; persons can be dangerous if they exhibit a clear disregard for the law and the rights of the public. *United States* v. *Warme*, 572 F.2d 57, 62 (2d Cir.), cert. denied, 435 U.S. 1011 (1978); *United States* v. *Ilacqua*, 562 F.2d 399, 404 (6th Cir. 1977), cert. denied, 435 U.S. 906 (1978); *United States* v. *Provenzano*, 605 F.2d 85, 93 (3d Cir. 1979). Petitioner's long-time association with highly placed organized crime figures afforded him a dangerous influence over organized crime activities, and his continuing criminal conduct, including his admitted bookmaking operations, demonstrated an obvious disregard for the law and the rights of the public.

In its unpublished opinion affirming petitioner's conviction and sentence, the court of appeals noted petitioner's challenge to his sentence under 18 U.S.C. 3575 but rejected it without discussion. App., *infra*, 2a n.1, 11a. The court stated simply that it had "considered [petitioner's] other claims of reversible error and [found] them to be without merit" (*id.* at 11a). Petitioner did not seek rehearing or argue that 18 U.S.C. 3576 requires a statement by the court of appeals of the reasons for its disposition of his challenge to his sentence. Nor did petitioner seek review of the court of appeals' decision in this Court.

3. Four years after his conviction was affirmed on direct appeal, petitioner filed a motion in the district court, pursuant to 28 U.S.C. 2255, to vacate his conviction and sentence. He claimed, inter alia, that the court of appeals' failure to state its reasons for affirming his DSO sentence denied him due process. He also argued that his trial counsel had been ineffective for two reasons: first,

because he failed to object to the admission of evidence relating to the acts charged in the count of the indictment on which petitioner had earlier been acquitted; second, that he did not seek to exclude or limit the introduction into evidence of petitioner's prior convictions or the fact that he had been incarcerated.

The district court—the same judge who had presided over petitioner's two trials and the DSO hearing—denied the petition for collateral relief (Pet. App. 1a-3a). The court concluded that the record "reveals no failure of constitutional due process resulting from the appellate court review of the enhanced sentence" (*id.* at 3a). The court also held that there was no ineffectiveness in counsel's failure to seek exclusion of evidence relating to a count on which petitioner had earlier been acquitted, because that evidence was relevant to the pending conspiracy charge (*id.* at 2a). With regard to petitioner's claim that counsel had been ineffective for failing to prevent the admission of evidence of his prior convictions and imprisonment, the court found "no violation" of any evidentiary rules "nor any quarrel with the tactical decision of counsel to put the defendant on the witness stand" (*ibid.*). The court of appeals affirmed.

ARGUMENT

1. Petitioner first contends (Pet. 5-9) that the court of appeals denied him due process by failing, in violation of 18 U.S.C. 3576, to review his DSO sentence and to state in writing its reasons for affirming the sentence. This contention raises no issue of continuing importance, because the DSO statute has been repealed effective November 1, 1987. See Pub. L. No. 98-473, §§ 212(a)(2) and 235, 98 Stat. 1987, 2031, as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728. In any event, the contention is without merit.

To begin with, petitioner is simply wrong in asserting that the court of appeals failed to review his sentence. The specific factors presented to and considered by the district court in arriving at the appropriate sentence were twice set forth in great detail before the court of appeals: initially, in the government's response to petitioner's motion for bail pending appeal, which was denied by the court of appeals; and again, in petitioner's direct appeal and the government's responding brief. Moreover, the court of appeals' unpublished opinion expressly noted petitioner's challenge to his DSO sentence. App., *infra*, 2a n.1. Although the court did not articulate its reasons for rejecting the challenge, it is clear from the opinion that the court of appeals considered and rejected petitioner's contentions on that issue.

The court of appeals' failure to state in writing its reasons for rejecting the attack on the DSO sentence obviously does not rise to the level of a due process violation. Moreover, petitioner's challenge on this ground (like the factually inaccurate assertion that the court of appeals failed to review the sentence) was waived by petitioner's failure to raise the issue to the court of appeals (by a rehearing petition) or to this Court (by a petition for certiorari) on direct appeal, when any error could have been quickly corrected. Petitioner has not passed either part of the "cause and prejudice" test for excusing his waiver. See *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982); see also *Murray* v. *Carrier*, No. 84-1554 (June 26, 1986); *United States* v. *Timmreck*, 441 U.S. 780, 783-784 (1979); *Norris* v. *United States*, 687 F.2d 899, 903 (7th Cir. 1982). Petitioner has not even alleged any cause for his failure to request a specific account of the reasons his sentence was affirmed on direct appeal. And the evidence of petitioner's illegal activities demonstrates that petitioner suffered no prejudice from the absence of written reasons for rejection (or, indeed, from any deficiency in appellate review) of his challenge to his DSO sentence.

Petitioner also seeks to argue (Pet. 6-8) that dangerousness must be proved by more than a preponderance of the evidence. This claim, however, is not included in the questions presented in the petition (Pet. i). Moreover, because petitioner made this argument and lost on direct appeal, the argument provides no ground for collateral attack. See *Barton* v. *United States*, 791 F.2d 265, 267 (2d Cir. 1986); *United States* v. *Kalish*, 780 F.2d 506, 508 (5th Cir. 1986), cert. denied, No. 85-1675 (May 19, 1986); *United States* v. *Redd*, 759 F.2d 699, 701 (9th Cir. 1985); *Tracey* v. *United States*, 739 F.2d 679, 682 (1st Cir. 1984), cert. denied, 469 U.S. 1109 (1985). In any event, as the courts of appeals uniformly recognize, there is no merit to the contention that due process requires a higher standard of proof of dangerousness than preponderance of the evidence. See *United States* v. *Darby*, 744 F.2d 1508, 1536-1538 (11th Cir. 1984), cert. denied, 471 U.S. 1100 (1985); *United States* v. *Vigil*, 743 F.2d 751, 760 (10th Cir.), cert. denied, 469 U.S. 1090 (1984).

Petitioner further argues (Pet. 8-9) that the district court was obligated to sentence him under 18 U.S.C. 371 and 2314 prior to considering and imposing the DSO sentence. This contention, like petitioner's burden-of-proof argument, is not included in the questions presented in the petition (Pet. i). In any event, it is meritless. The DSO statute nowhere requires the procedure that petitioner proposes. Although the court must ensure that its DSO sentence is not disproportionate to the "maximum term otherwise authorized by law" for the particular felony convictions (18 U.S.C. 3575(b)), the statutes defining the felonies themselves provide that information (for 18 U.S.C. 371, five years' imprisonment and a $10,000 fine; for 18 U.S.C. 2314, ten years' imprisonment and a $10,000 fine). And there is simply nothing in the decisions cited by petitioner (Pet. 9) to suggest that the proposed two-step sentencing procedure is required. *United States* v. *Soto*, 779 F.2d 558,

559 (9th Cir. 1986); *United States* v. *Scarborough*, 777 F.2d 175, 176 (4th Cir. 1985); *United States* v. *Calabrese*, 755 F.2d 302, 305 (2d Cir. 1985).

2. Petitioner also contends (Pet. 10-13) that he was denied the effective assistance of counsel at his trial. The district judge who presided over petitioner's trial and sentencing proceeding found otherwise. Pet. App. 1a-2a. That conclusion is fact-bound and correct. Further review by this Court is not warranted.

a. Petitioner first claims (Pet. 10, 11) that his trial counsel was ineffective for failing to seek exclusion of evidence that was related to the charge of transportation of stolen securities from Florida to Texas, for which he had been acquitted at his first trial. Petitioner fails to identify what evidence he thinks was improperly admitted at the second trial. Moreover, contrary to petitioner's apparent misconception, the collateral estoppel ban on relitigating certain issues does not prohibit the use of evidence introduced in a prior proceeding if that evidence is offered to prove different facts. Here, to the extent evidence concerning the transportation of stolen securities to Texas was admitted at petitioner's second trial, it was not offered to establish that petitioner engaged in or caused such transportation, as alleged unsuccessfully in the first trial; rather, it was offered to prove the conspiracy of which petitioner was convicted in the second trial.

Our examination of the second trial transcript reveals that very little was said about the transportation of stolen stock certificates to Texas. One reference was made by co-conspirator Alva Rodgers, who testified that he gave some of the blank certificates to David Pemberton and expected him to sell them in Texas (14 R. 140-141). Rodgers was subsequently told that Pemberton had been arrested at the Dallas/Fort Worth Airport with a suitcase full of money

(14 R. 141). Unable to locate any news reports of the arrest, however, Rodgers surmised that the reason he saw no profit from the certificates was not that Pemberton had been arrested but, instead, that Pemberton had stolen the certificates. A second reference to Texas occurred days later, during Pemberton's testimony. Pemberton testified about his efforts to sell the stolen certificates, including his dealings with an individual in Texas who had Mexican contacts and agreed to take some of the certificates (15 R. 306, 308). Pemberton testified that he flew to Dallas to exchange the securities for cash and was arrested there with 1400 shares (15 R. 310-313). He then explained how other members of the conspiracy were to participate in the anticipated profits from the 1400 shares of stock (15 R. 313-319).

This testimony concerning the transportation of the stolen shares to Texas was offered not to show that petitioner transported the shares to Texas or caused them to be transported, but for the legitimate purpose of proving the existence and nature of the conspiracy. Accordingly, as the district court concluded in denying collateral relief (Pet. App. 2a), counsel committed no error in failing to seek exclusion of this admissible evidence. In any event, petitioner has not demonstrated how he was prejudiced by the admission of the evidence. See *Strickland* v. *Washington*, 466 U.S. 668 (1984).

b. Petitioner also alleges (Pet. 10, 11-12) that he was deprived of effective assistance of counsel because of his lawyer's failure to prevent the admission, during the government's case-in-chief, of evidence of petitioner's prior incarceration. Again, petitioner fails to identify where in the record the allegedly prejudicial reference occurred. In fact, the single such reference that petitioner apparently has in mind was inadvertent and was objected to by counsel. It was also harmless, especially when considered in light of petitioner's decision to testify about his prior incarceration and convictions.

In December 1972, petitioner was released from the Atlanta Federal Penitentiary, where he had been serving a ten-year sentence. While in prison, he became acquainted with co-conspirator Rodgers, a jailhouse lawyer who assisted petitioner in seeking collateral relief from his conviction. As a result of Rodgers' efforts, petitioner was released from the penitentiary approximately 11 months earlier than originally scheduled. In gratitude, petitioner suggested that Rodgers come to Chicago upon his release. Rodgers did so. Petitioner found a rent-free apartment for him, and the two men began to spend considerable time together.

This background to their friendship was a crucial part of the government's case. Rodgers, however, did not testify that the two men met in jail; he referred during the government's direct examination simply to their association in "Georgia" and the friendship that resulted from their daily contact (14 R. 69-70, 75-78). The government tried to exclude reference to petitioner's prior incarceration: for example, in phrasing a question to Rodgers, the government asked "without specifying a particular place, were there conversations between [petitioner], yourself, and other people, people that you knew previously in your life?" (14 R. 71). Rodgers' reference to petitioner's prior incarceration was inadvertent and came just prior to that cautionary question. Rodgers began a response, "Well, we had a man who was in our cell quite often from * * *" (14 R. 70). Petitioner's counsel interrupted the answer and objected; the prosecutor withdrew the question; and the court announced that the question was withdrawn. The unsolicited slip by Rodgers was plainly not so prejudicial as to call for a mistrial, and counsel was therefore not ineffective in failing to move for that relief. Moreover, petitioner's own testimony concerning his prior criminal

history nullified any possible prejudice that could have resulted from Rodgers' single mention of the word "cell."[2]

c. Finally, petitioner challenges (Pet. 10-12) counsel's failure to secure exclusion of petitioner's history of prior convictions (as opposed to the fact of his incarceration). In particular, he challenges counsel's failure to move to exclude the evidence on the ground that it was too stale, as well as counsel's decision to elicit petitioner's prior criminal history during his direct examination of petitioner. Under Fed. R. Evid. 609, however, the prior crimes evidence was clearly admissible for impeachment purposes. Fed. R. Evid. 609(b) provides that evidence of a conviction is admissible if the witness was released from confinement for the conviction less than ten years before the trial. Petitioner was sentenced to ten years' imprisonment for his October 1966 conviction and to two years' imprisonment, consecutive to the ten-year sentence, for a 1968 conviction. Petitioner was not released from confinement for those convictions until December 1972. Because petitioner's trial in this case took place in March 1980, both of those convictions were admissible under the ten-year rule of Fed. R. Evid. 609(b). Counsel was therefore not ineffective for failing to file a fruitless motion to exclude evidence of the convictions.

---

[2] *Tallo* v. *United States*, 344 F.2d 467 (1st Cir. 1965), *United States* v. *Smith*, 403 F.2d 74 (6th Cir. 1968), *United States* v. *Gray*, 468 F.2d 257 (3d Cir. 1972) (en banc), and *United States* v. *Sostarich*, 684 F.2d 606 (8th Cir. 1982), do not support petitioner. In *Tallo*, the defendant did not testify or otherwise voluntarily expose his prior history; moreover, counsel did not object when the evidence came in. In the remaining cases, the prosecutor improperly elicited the challenged reference. In any event, the prejudicial impact of attorney errors is determined in part by the weight of the evidence at trial. Here, both direct testimony by co-conspirators and corroborative evidence pointed strongly to petitioner's guilt.

Petitioner's challenge to his counsel's examination of him concerning his prior convictions is similarly meritless: the examination was the result of a deliberate and reasonable plan to try to blunt the impact of the evidence, which was bound to come out during the government's cross-examination of petitioner. Counsel's questions elicited innocent explanations for the prior convictions—that one conviction, which was based on an extortionate collection of a debt, was erroneous because petitioner's meeting with the debtor was innocent and non-threatening (15 R. 378-383); that another, for possession of stolen securities, was erroneous because petitioner did not know that the certificates were stolen (15 R. 383-389). Petitioner's counsel committed no unprofessional error in eliciting these explanations before the government asked about petitioner's convictions on cross-examination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SARA CRISCITELLI
Attorney

MAY 1987

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-5433

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARSHALL CAIFANO, A/K/A "JOHN MARSHALL",
DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Florida

---

January 26, 1982

Before THORNBERRY*, FAY and HATCHETT, Circuit Judges.

PER CURIAM:

This appeal requires a review of whether the trial court erred in permitting the prosecution to exceed the permissible scope of cross-examination and to improperly bolster the testimony of its chief witness. We affirm.

FACTS

In October, 1968, five thousand blank and unissued Westinghouse Electric Corp. common stock certificates were stolen during shipment from New York to Chicago. Appellant, Marshall Caifano, subsequently was indicted for conspiracy to possess stolen securities which moved

---

* The Honorable Homer Thornberry, Circuit Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

in interstate commerce, 18 U.S.C. § 371 (Count I), the transportation in interstate commerce of stolen securities, 18 U.S.C. §§ 2 and 2314 (Count II), and the possession of stolen securities, 18 U.S.C. § 659 (Count V). The government's chief witness, Alva Johnson Rodgers, was named in the indictment as Caifano's co-defendant and co-conspirator.

Following a trial in February, 1980, a jury acquitted appellant on Count V but was unable to reach a verdict as to the two remaining counts. Appellant was retried and convicted on these counts in March, 1980. After a hearing, the district court found appellant to be a dangerous special offender and sentenced him to a twenty-year term as to each count to run concurrently.

On appeal, Caifano argues that the government overstepped the limits of proper cross-examination and committed prejudicial error in improperly bolstering the testimony of its key witness.[1]

ISSUES

We must consider whether the government committed reversible error on cross-examination in attacking defendant's character by (1) extensively inquiring into the details of prior convictions admitted by defendant on direct examination, (2) suggesting the existence of prior unindicted offenses, (3) revealing that defendant had few "legitimate" jobs in his lifetime, (4) implying that defendant was connected with organized crime, and (5) emphasizing that he was under police surveillance. We must also examine

---

[1] Appellant also requests this court to set aside his sentence, contending that the statute under which he was sentenced, the "Dangerous Special Offender" statute, 18 U.S.C. § 3575, is unconstitutional on its face and as applied herein. In addition, Caifano urges that a new judge should preside on remand since the trial court was exposed to information concerning defendant's status as a dangerous special offender.

whether the prosecutor committed prejudicial error in bolstering its key witness by eliciting from him the fact of his guilty plea in the instant case and by commenting that the plea agreement had been signed by the prosecutor and submitted to the trial court.

UNFAIR CROSS-EXAMINATION

Appellant contends that the cross-examination on details of his prior offenses exceeded the permissible bounds of impeachment under Rule 609 of the Federal Rules of Evidence.[2] Testifying in his own behalf, Caifano admitted that he had been convicted in 1968 of extortion, and that shortly thereafter he had pleaded guilty to an offense that "had something to do with stocks and bonds." In explaining the extortion conviction on direct examination, appellant stated that he merely attempted to collect a gambling debt for a "friend." He also stated that he chose not to testify at that trial because he was confident that the facts would show that he used no force against the victim and that he believed he would be acquitted. In explaining the securities conviction, appellant testified that he was with other persons who had stolen the securities which they were going to use as collateral for a loan. Caifano further stated that he pleaded guilty on the advice of his counsel and to avoid trial expenses.

On cross-examination, appellant admitted that he decided not to testify in the extortion trial only after he heard all

---

[2] Fed. R. Evid. 609 provides, in pertinent part:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

of the government's evidence. Caifano further stated that his "friend" denied that he had authorized appellant to collect a debt for him. Caifano also admitted that the victim testified that he was beaten up in a car by appellant's co-defendant in appellant's presence. With respect to the securities conviction, appellant admitted that he had pleaded guilty to interstate transportation of stolen securities and that he had received $11,000 in profits in connection therewith.

Caifano contests the scope of the government's cross-examination concerning his prior criminal record after he raised the subject of his prior convictions in taking the stand in his own defense. For impeachment purposes, the prosecutor may properly inquire into the number, date, and nature of prior convictions on cross-examination of the accused, but ordinarily is precluded from examining the details of the crime for which the accused was convicted. *United States v. Tumblin,* 551 F.2d 1001, 1004 (5th Cir. 1977); *United States v. Bray,* 445 F.2d 178, 182 (5th Cir. 1971), *cert. denied,* 404 U.S. 1002 (1972); *United States v. Wolf,* 561 F.2d 1376, 1381 (10th Cir. 1977).

Where, however, an accused on direct examination attempts to "explain away" the effect of the conviction or to minimize his guilt, the government may cross-examine him on facts relevant to the direct examination. *United States v. Barnes,* 622 F.2d 107, 109 (5th Cir. 1980); *United States v. Wolf,* 561 F.2d at 1381. A defendant who testifies in his own defense "has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts." *Brown v. United States,* 356 U.S. 148, 155 (1958), *quoting Fitzpatrick v. United States,* 178 U.S. 304, 315 (1900). Indeed, it would be unfair to delimit cross-examination so that the defendant could choose to testify on direct examination in a manner which would "provide himself with a shield against contradiction of his untruths . . . in reliance on the

Government's disability to challenge his credibility." *Walder v. United States,* 347 U.S. 62, 65 (1954).

In the instant case, the effect of Caifano's testimony on direct examination was to explain away his active role in the offenses that were the subject of his prior convictions and effectively to deny his guilt. The rebuttal was therefore admissible on a theory of "opening the door" to remove any unfair prejudice which may have resulted from Caifano's attempt to minimize his guilt. *Wolf,* 561 F.2d at 1381; *United States v. Winston,* 447 F.2d 1236, 1240 (D.C.Cir. 1971), *citing California Insurance Co. v. Allen,* 235 F.2d 178, 180 (5th Cir. 1956).

Because appellant put in issue and distorted his motive for failing to testify at the extortion trial and for pleading guilty to the securities offense and depicted his role in the events leading to his extortion conviction as innocent and peaceable, we find that the cross-examination was sufficiently relevant to Caifano's direct testimony as to preclude any error. Further, we do not find any error in permitting the prosecutor to elicit from the appellant the length of his confinement. *Barnes,* 622 F.2d at 109; *Beaudine v. United States,* 368 F.2d 417, 421 n.8 (5th Cir. 1966).

Caifano also argues that because of the similarity between the prior securities conviction and the offense which is the subject of the instant case, the prosecutor's ability to inquire into the details of that prior offense should have been severely restricted because of the likelihood of prejudice. *United States v. Turquitt,* 557 F.2d 464, 468-69 (5th Cir. 1977); *United States v. Hayes,* 553 F.2d 824, 828 (2nd Cir.), *cert. denied,* 434 U.S. 867 (1977). Where the defendant is a witness, such cross-examination creates the possibility that the jury will consider the criminal nature which is the subject of the prior conviction as evidence that the defendant acted illegally on the occasion in question. *Barnes,* 622 F.2d at 109. The cross-examination on

the security conviction, however, as noted above, was proper as impeachment by contradiction. On direct examination, Caifano painted himself as a picture of innocence by stating that the securities conviction "had something to do with stocks and bonds" and on cross-examination by further noting that "evidently they were gotten in a legitimate way somehow."

Appellant also complains that the prosecutor improperly suggested on cross-examination that he had been the subject of an income tax evasion investigation. The trial court sustained defense counsel's objection to the question. Because this examination was brief and because the government elicited no details or explanations, we find that this testimony was harmless. *United States v. Wilkinson,* 601 F.2d 791, 797 (5th Cir. 1979).

We also disagree with appellant's contention that the cross-examination concerning his representation of the "Chicago interest" in a Las Vegas country club suggested that he was involved in organized crime. The question was proper in light of Caifano's direct testimony that his business concerns in Las Vegas were connected with his real estate and construction business. Further, the reference to "Chicago interest" did not introduce the spectre of organized crime but rather was explained by the prosecutor to mean "that people from Chicago had a cut of the [country club's] profit." The cases cited by appellant are inapposite as they involve the highly prejudicial use of widely recognized terms which suggest involvement in organized crime or other well-known enterprises of ill-repute. *See, e.g., United States v. Marques,* 600 F.2d 742, 749 (9th Cir. 1979), *cert. denied,* 444 U.S. 858 (1980) (Hell's Angels); *United States v. Love,* 534 F.2d 87, 88 (6th Cir. 1976) (mafia and organized crime).

We also find that appellant, having "opened the door" with the testimony about his prior employment to support the implication that he was an honest retired businessman,

cannot complain about the government's questions which offset the inference of lawful industriousness portrayed on direct examination. *California Ins. Co. v. Allen,* 235 F.2d at 180.

In addition, appellant argues that the government's inquiry into his awareness that he was a target of police surveillance was irrelevant other than to suggest that the defendant was a "bad man." After reading the record and considering the allegation, we deem any improprieties inherent in this cross-examination harmless error in view of the overwhelming evidence against appellant. *United States v. Sandini,* 660 F.2d 544, 546 (5th Cir. 1981).

IMPROPER BOLSTER

On the government's direct examination of co-defendant Rodgers in this trial, the prosecutor asked him whether "in connection with the case pending where you are going to be sentenced by Judge Paine, is there a plea agreement letter signed by both yourself, your attorney, and myself?" Rodgers admitted that there was and that the agreement had been submitted to the trial judge. Defense counsel neither objected to Rodger's testimony relating to his guilty plea nor requested a limiting instruction from the court. Further, appellant vigorously cross-examined Rodgers concerning his plea and indicated that Rodgers had pleaded guilty to the same charges pending against appellant by asking whether Rodgers had entered a plea "to certain counts of the indictment" and by emphasizing that the trial court would consider the nature and extent of Rodgers's cooperation in meting out his sentence "in this case."

It was not until several days later that appellant sought a mistrial on the basis of the government's revelation of Rodgers's guilty plea. The trial court offered to give a cautionary instruction on the purpose for which the testimony concerning the plea was admitted but appellant

objected that a cautionary instruction would not correct the error. The court subsequently denied the motion for a mistrial on the ground that the government had sought to elicit the criminal record of the witness in anticipation of an attack on his credibility on cross-examination, and not for the purpose of proving the charges in the indictment. Defense counsel then requested that the court refrain from issuing a cautionary instruction restricting the use of the guilty plea.

Appellant argues that the government committed plain error by improperly eliciting from its key witness, defendant's alleged co-conspirator, that he had entered a guilty plea and was awaiting sentencing by the trial judge. Caifano urges that the prosecutor thereby prejudiced appellant by unfairly suggesting that because the co-defendant was guilty of the same charges, the appellant must be guilty as well. In addition, appellant contends that the government impermissibly vouched for its witness's credibility by revealing that the prosecutor signed the plea agreement and that the agreement had been submitted to the judge. The prosecution, Caifano argues, compounded this prejudice in closing argument by reemphasizing the fact of the guilty plea and by suggesting that he and the judge believed the witness truthful. The government, however, argues that it was entitled to elicit the guilty plea because it was clear that the defense strategy would be to impeach the witness's credibility.

Because of the potential for prejudice inherent in a co-defendant's tetimony that he has pleaded guilty to the crime for which the defendant is charged, it is well settled that a co-conspirator's guilty plea or conviction may not be used as substantive evidence of the guilt of another. *United States v. Alanis,* 611 F.2d 123, 126 (5th Cir.), *cert. denied,* 445 U.S. 955 (1980); *United States v. King,* 505 F.2d 602, 607 (5th Cir. 1974). The conviction or guilty plea of a co-conspirator, however, his admissible for limited

evidentiary purposes such as impeachment. *United States v. Miranda,* 593 F.2d 590, 594 n.4 (5th Cir. 1979); *King,* 505 F.2d at 607.

In assessing whether the admission of the plea constituted plain error, we must carefully examine all the facts and circumstances of this particular case including

> the presence or absence of a limiting instruction; whether there was a proper purpose in introducing the conviction or guilty plea of the codefendant; whether the plea or conviction was improperly emphasized or used as substantive evidence of guilt; whether the alleged error was invited by defense counsel; whether an objection was entered or an instruction requested; whether the failure to object could have been the result of tactical considerations; and whether, in light of all the evidence, the error was harmless beyond a reasonable doubt.

United States v. Jimenez-Diaz, 659 F.2d 562, 566 (5th Cir. 1981), *citing, United States v. King,* 505 F.2d 602, 608 (5th Cir. 1974); *Miranda,* 593 F.2d at 594.

After a careful review of the record, we are firmly convinced that the admission of Rodger's guilty plea presented no reversible error. The prosecutor made no impermissible use of the plea and did not argue to the jury that the plea should be used as substantive evidence of the defendant's guilt. Rather, the prosecutor merely argued that Rodgers's testimony was worthy of belief and should be accorded significant weight. *Jimenez-Diaz,* 659 F.2d at 566; *Miranda,* 593 F.2d at 595. Further, the Fifth Circuit has held that where the prosecutor introduces the co-defendant's guilty plea on direct and neither stresses that plea nor intimates to the jury that the defendant's guilt can be inferred from the co-defendant's guilty plea, the trial court's failure to give an unrequested cautionary instruction is not plain error. *King,* 505 F.2d at 609; *United States v. Rothman,* 463 F.2d 488, 490 (2nd Cir.), *cert. denied,* 409 U.S. 956 (1972).

In addition, it was clear from defense counsel's opening statement and cross-examination of Rodgers at the first trial that his impeachment was a primary defense tactic. Thus, defense counsel "invited" the prosecutor's comments on direct examination of Rodgers at the second trial to "soften the blow" of impeachment and to minimize the impression that the government was trying to conceal Rodgers's guilty plea. Further, where, as here, the co-defendant appeared in court and was subject to cross-examination and no "aggravating circumstances" are shown, disclosure of the guilty plea to thwart the impact of credibility attacks serves a legitimate purpose and is permissible. *United States v. Romeros,* 600 F.2d 1104, 1105 (5th Cir. 1979), *cert. denied,* 444 U.S. 1077 (1980); *United States v. Veltre,* 591 F.2d 347, 349 (5th Cir. 1979). Alternatively, in view of all the evidence, we find the error harmless beyond a reasonable doubt. *Jimenez-Diaz,* 659 F.2d at 566.

Appellant also challenges the prosecutor's closing argument as an impermissible vouching for his witness's credibility. It is well settled that an attorney may not express his own opinion as to the credibility of witnesses. *E.g., United States v. Morris,* 568 F.2d 396, 401 (5th Cir. 1978); *United States v. Herrera,* 531 F.2d 788, 790 (5th Cir. 1976). To warrant reversal, prosecutorial misconduct must be "so pronounced and persistent that it permeates the entire atmosphere of the trial." *Alanis,* 611 F.2d at 126.

We find that the prosecuting attorney committed error when he stated that Rodgers was "telling a complete and utter truth because Judge Paine is the one who was going to sentence him. His motive is to tell the truth; is to be as open as possible." Although the prosecutor's comments constitute error, they did not amount to reversible error. Because we find, upon an examination of the entire record, that the defendant did not suffer substantial prejudice, we hold the error harmless. *Alanis,* 611 F.2d at 127;

Morris, 568 F.2d at 402. We also find that the admission of the fact of the plea agreement did not constitute an impermissible bolstering by the prosecutor of his witness. *United States v. Martino,* 648 F.2d 367, 389 (5th Cir. 1981).

We have considered appellant's other claims of reversible error and find them to be without merit.

CONCLUSION

Because we find that the government's cross-examination of appellant and its bolstering of its chief witness did not constitute reversible error, appellant's conviction is affirmed.

AFFIRMED

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40336

(3)

No. 86-1304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARSHALL CAIFANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

RICHARD B. CAIFANO
188 West Randolph Street
Suite 626
Chicago, Illinois 60601
(312) 346-0570
Attorney for Petitioner

Of Counsel:
MELVIN B. LEWIS

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

10 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARSHALL CAIFANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

ARGUMENT

1. The Appeals' Court Failure To Grant Mandatory Review Of Petitioner's Sentence.

A. *The Continuing Importance of The Issue* (cf. U.S. Br. p. 7).

It is difficult for petitioner to accept the government's suggestion that this Court should tolerate a continuing injustice against one individual if it is offered the assurance that that same injustice will not be visited upon any other individuals.

However, it is noted that the repeal of enhanced sentencing under Section 3575 of Title 18 U.S. Code is prospective and does not become effective until November 1, 1987. Courts of review will continue to address challenges to sentences imposed under that provision for some time.

Therefore, the concept of enhanced sentencing for special dangerous offenders continues as a part of our current law; see also, Title 21 U.S. Code Section 849, "Dangerous Special Drug Offender Sentencing". The government's contention that petitioner's due process violation claims raise no issue of continuing importance is simply untenable.

B. *Sufficiency of Prior Appellate Review.*

The DSO statute mandates that the court of appeals "shall state in writing the reason for its disposition of the review of the sentence" (18 U.S.C. 3576). The government now argues that this duty was performed by the inclusion within the opinion of the following sentence:

> "We have considered appellant's other claims of reversible error and find them without merit."

With all due respect, we urge that the quoted stock assertion is, as applied to Section 3576's mandated statement of "the reason for" such a conclusion, evasion rather than discharge of the statutory requirement.

On direct appeal of petitioner's conviction, the Court of Appeals concluded, quite simply:

> "Because we find that the government's cross-examination of appellant and its bolstering of its chief witness did not constitute reversible error, appellant's conviction is affirmed" (Br. 11a).

While it is true that a footnoted reference of the opinion recognizes petitioner's request that the DSO sentence be set aside on constitutional grounds, the court did not consider petitioner's contentions, it merely acknowledged that the contentions had been presented.

If the court's language be given the conclusive and broad effect assigned by the government, it compels the absurd result that an improper sentence enhancement is appropriate where there is no improper cross examination of a defendant or bolstering of government witnesses.

Without the benefit of supporting authority, the government concludes that the Court of Appeals' failure to state in writing its reasons for affirming the DSO sentence does not rise to the level of a due process violation. This Court has ruled that where a protected liberty interest is created by statute, the failure to satisfy the express provisions of the law granting procedural safeguards to the individual possessed of the liberty interest constitutes a violation of due process. *Wolff v. McDonnell,* 418 U.S. 539 (1974); *Vitek v. Jones,* 445 U.S. 480 (1980). There can be no question that enhanced sentencing under the DSO Act presents a serious liberty interest to petitioner. It is equally certain that Section 3576 establishes the procedural requirement of broad appellate review of any sentence so imposed with the additional mandate that the reviewing court state in writing its reasons for the disposition of the sentence reviewed, in order to promote uniformity and preclude idiosyncratic application.

Due process is afforded to petitioners and others whose sentences have been so enhanced. A simple footnoted reference to the fact that an attack has been made upon the sentence fails to comply with the minimum standards for due process established by this Court as mandated by statute.

2. Ineffective Assistance Of Counsel.

A. *Evidence Barred by The Doctrine of Collateral Estoppel* (cf. U.S. Br. 10).

With respect to petitioner's claim of violation of the Doctrine of Collateral Estoppel, the government makes two claims:

1. that no violation occurred; and
2. that any error was harmless.

The government's contention that no violation occurred is bottomed on its assertion that the evidence was introduced "not to show that the petitioner transported the shares to Texas or caused them to be transported, but for the legitimate purpose of proving the existence and nature of the conspiracy." (Br. p. 11). This quite literally is a distinction without a difference. It never had been suggested by anyone that petitioner had personally traveled from Florida to Texas or, indeed, that he ever had been in either State. His liability in that respect was always assigned as vicarious; and in fact, the jury at the first trial acquitted him of that charge after receiving an instruction which recited:

> "The guilt of an accused in a criminal case may be established without proof that he personally did every act constituting the offense alleged. The law recognizes that ordinarily anything a person can do for himself may also be accomplished by him through direction of any other person as his agent, or by acting in concert with or under the direction of, another person or persons in a joint effort or enterprise.
>
> "Title 18 U.S. Code, Section 2 provides:
>
> > 'Whoever commits an offense against the United States, or aids, abets, counsels, commands or procures its commission, is punishable as a principal'

> "Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal. So, if the acts or conduct of an agent, employee or other associate of the defendant are wilfully directed or authorized by him or if the defendant aids and abets another person by wilfully joining together with such person in the commission of a crime then the law holds the defendant responsible for the acts and conduct of such other persons just as though he had committed the acts or engaged in such conduct himself." (R. proceedings before Judge Paine, February 14, 1980 in *United States v. Marshall Caifano*).

It follows therefore that in this case there functionally is no difference between the vicarious liability sought to be asserted against the petitioner for the act of transportation and the vicarious liability sought to be asserted against him on the theory of conspiracy to transport. The proofs are identical. The charge itself is essentially identical in this application, because there is no question but that the shares were in fact transported to Texas by the alleged co-conspirator. The petitioner, who had been found not guilty of causing the shares to be transported to Texas, could not rationally be prosecuted for conspiring to cause that transportation.

In the context of this case, the concept of a conspirator in the transportation of the securities from Florida to Texas, who in no way caused those securities to be transported, is a contradiction in terms.

With respect to the alleged harmlessness of the evidence, the government points out that only two witnesses mentioned the matter. These, however, were the only two witnesses who could have provided such testimony. And, because Pemberton, the key witness in that respect—the active transporter—had never seen petitioner, the evi-

dence that he had transported shares to Texas where he sought to sell them and evidence that shares had been seized from him upon his arrest in Texas provided significant collateral support to the story of the *only* witness against petitioner, Alva Rodgers.[1] It is impossible to conclude that without Pemberton's testimony the jury would have convicted petitioner.

The first jury did not find the petitioner guilty of anything. It is therefore impossible to say that the evidence against him was sufficient to render harmless the type of collateral support dispensed in the second trial by evidence of the Florida-to-Texas transaction.

The impropriety of that evidence, however, cannot reasonably be considered apart from the woeful failure of professional assistance by trial counsel's failure to have objected to it. As in the case of the detailed references to petitioner's prior convictions, the evidence was not only harmful in itself but emblematic of substantial neglect of trial counsel to provide the level of assistance mandated by the Sixth Amendment.

B. *Prior Convictions* (cf. U.S. Br. 13).

Petitioner's trial lawyer introduced evidence of petitioner's prior convictions and incarceration in excruciating detail, far beyond anything which the government would have been allowed to elicit for impeachment purposes. That was done without any prior attempt to invoke the

[1] At trial, government counsel conceded that, ". . . Mr. Caifano's dealings were with Mr. Rodgers and there is no evidence that the government presented nor do we claim that Mr. Caifano had any dealings with Mr. Pemberton." (R. 15, pp. 369-70); and, "In this case it is clear in the cross examination by Mr. Varon (trial counsel for petitioner) that the only witness that implicated defendant is Rodgers" (R. 16, p. 496).

court's discretion [under Rule 609(a)] with respect to those convictions, nor to make the point that the sentence on the earlier conviction had in fact been completed more than ten years prior to the date of trial.[2]

That performance cannot be justified as a tactical selection of an appropriate response to the government's case. The government argues that its evidence of petitioner's prior incarceration was merely a harmless inadvertent slip on the part of the witness Rodgers, which was overcome by the withdrawal of that question. How then may defense counsel's detailed questioning of petitioner regarding his prior incarceration be justified as a reasonable response to that evidence (R. 15, pp. 375-77).

The record in this case is studded with repeated instances of errors and omissions on the part of trial counsel that may not be rationalized or excused. The evidence that was elicited by the shortcomings of counsel adversely affecting substantial rights of the petitioner to a fair trial.

Respectfully submitted,

RICHARD B. CAIFANO

Attorney for Petitioner

Of Counsel:
MELVIN B. LEWIS

---

[2] The government claims that the petitioner had been released nearly 8 years before trial. However, for two of those years, one sentence had been fully served. Petitioner was then serving a second consecutive sentence imposed in a different case, service of which was completed in December, 1972. At best, therefore, the government would have been permitted to introduce evidence of only one of those convictions. Since the other had expired more than ten years before trial. See, *United States v. Cavender*, 578 F.2d 531 (5th Cir. 1978).